*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: July 20, 2004

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Martin Selig d/b/a
Martin Selig Real Estate 512-5009-0100
Case 19-CA-28614 512-5009-6700

The Region submitted this BE & K[1] case for advice as to whether the Employer's lawsuit and pursuit of a preliminary injunction against the Service Employees International Union, Local 6 was unlawful.

We conclude that it would not effectuate the purposes of the Act to litigate this matter. In that regard, while the state court lawsuit resulted in the issuance of a temporary restraining order, the court has lifted the TRO and in so doing has awarded attorney's fees to the Union. While a Board remedy would have further required a notice posting, such a limited additional remedy does not justify the litigation of this matter.

## FACTS

Martin Selig d/b/a Martin Selig Real Estate (the Employer) is the owner and manager of about 12 commercial office buildings in Seattle. On or about November 15, 2002, Selig ceased doing business with a union janitorial firm, which had provided janitorial services in its buildings, and contracted with a non-union firm, Allied Building Services (Allied).[2] On February 18, 2003,[3] Union representatives met with representatives of the Employer regarding the change in janitorial service companies. At that meeting, the Union

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[1] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[2] Beginning in the summer of 2002, the Union attempted to organize some of Allied's employees at its Bellevue, Washington locations. A series of unfair labor practice charges were filed by the Union against Allied. Complaint issued on allegations including 8(a)(3) discharges. While the charges were ultimately settled, the dispute was at or near its height when Martin Selig contracted with Allied.

[3] All dates are in 2003 unless otherwise noted.

unsuccessfully attempted to persuade Selig to end its contract with Allied. According to Selig's representative, Union agents ended the meeting by threatening to take unspecified actions to persuade Selig to cease doing business with Allied.

Over the next few months, the Union handbilled Selig, its tenants and the public attending a performance at a local theater; sponsored demonstrations at Selig's main office building; and helped organize tenants meetings to discuss Selig's labor dispute with the Union, building security, and Selig's account with the local electric utility. The Union contends that its conduct was part of a lawful consumer education program advising the public and the Employer's tenants of Selig's replacement of a union janitorial firm with a firm that had allegedly committed several unfair labor practices and paid substandard wages and benefits.

On April 8, in response to the Union's campaign, Selig filed a complaint in King County Superior Court seeking damages, a temporary restraining order (TRO) and a preliminary injunction. The Complaint pled the following causes of action:

1.) Intentional Interference with contractual relations;
2.) Defamation and commercial disparagement;
3.) Violation of the Unfair Business Practices Act; and
4.) Civil Conspiracy.

The TRO, among other things, sought to restrain the Union from:

> Having contact or communication with persons known to be tenants of Martin Selig Real Estate ("Selig") or any business entity owned by or affiliated with Selig regarding any matter relating to (i) the conduct of Selig's business or to (ii) Selig's relationship with Allied Building Services …

In support of its action, Selig provided affidavits to the Court from Lauren Selig, its manager and "point person," and Lisa Gallagher, the clerk for its legal representative.

At the time the lawsuit was filed and the TRO sought, the Union was publicizing its disputes with Allied by handbilling the public. Each count in the lawsuit alleges this handbilling activity as a basis for relief, and the separate defamation count alleges specific handbills to be

defamatory. Lauren Selig's affidavit -— supported by Lisa Gallagher's affidavit -- together with copies of the handbills and other communications constitute the entire evidentiary record in this matter. The Complaint alleged that the enumerated handbills constituted defamation as they were:

> unprivileged publications of false and/or misleading information which the defendants knew to be false or with regard to which defendants exercised reckless indifference as to its truth or falsity … intended to cause and [which] in fact did cause, plaintiff to sustain substantial injury …

Selig also pled facts with regard to the remainder of the counts so as to establish a cause of action under Washington State law. However, at this preliminary stage of the litigation, the evidence supported the complaint allegations in a wholly conclusory manner. For instance, Laura Selig's affidavit asserts that one of the handbills "falsely accused Selig of fraudulent overcharging of tenants" and that another "falsely inform tenants that they were in imminent danger of having their electrical service cut off without notice because Selig was in arrears on his account with City Light."

Based on the Complaint and the accompanying affidavits, the Court Commissioner granted the TRO. Shortly thereafter, however, the Union filed a motion to vacate that order, which resulted in a May 2 ruling dissolving the temporary restraining order. The court also denied the Employer's Motion for a Preliminary Injunction. As a remedy for the imposition of the vacated TRO, the court awarded the Union its costs of litigating that order, which the court calculated to be about $18,000. The underlying lawsuit remained outstanding and was scheduled for trial in August 2004.

In late July, Selig terminated its contract with Allied and began performing the janitorial work in-house. According to Selig, its janitors are paid union scale and the equivalent of union benefits. On August 5, Selig filed a Motion for Voluntary Dismissal without Prejudice and the Court granted the Motion on August 18. There had been no discovery in this matter. Selig indicated that all activity by the Union ceased after the lawsuit was dismissed.

**ACTION**

Even if the Respondent's lawsuit is baseless and retaliatory under BE & K/Bill Johnson's,[4] we conclude that it would not effectuate the purposes of the Act to litigate this matter. Thus, by vacating the TRO and awarding attorney's fees to the Union for its litigation costs, the state court seriously undercut the need for a Board remedy.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits.[5] Previously, the Supreme Court had suggested that if the suit was ultimately shown to be without merit, the Board could find a violation merely by proving that the suit was filed with a retaliatory motive.[6] However, in BE & K the Court directed the Board to make an independent evaluation as to whether a concluded lawsuit was reasonably based.[7]

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative. Under Bill Johnson's, the Board may conclude the lawsuit is baseless if it determines that the suit presents "plainly foreclosed" or "frivolous" legal issues.[8] The Board may also go behind the bare pleadings to determine whether a lawsuit is baseless because it alleges facts that are unsupportable or unsupportable inferences from facts.[9] In doing this, the Board may draw guidance from summary judgment jurisprudence and reject plainly unsupportable

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[4] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

[5] BE & K, 536 U.S. at 527, 532, 536.

[6] Bill Johnson's, 461 U.S. at 747, 749. The Board applied this guidance to withdrawn suits. See, e.g., Vanguard Tours, Inc., 300 NLRB 250, 254-55 (1990), enf. denied in pertinent part, 981 F.2d 62 (2nd Cir. 1992).

[7] BE & K, 536 U.S. at 530-537.

[8] Bill Johnson's, 461 U.S. at 746.

[9] Id. The Board's inquiries are subject to certain constraints. For example, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. Nor may the Board determine "genuine state-law legal questions." Id. at 744-46.

inferences from the undisputed facts and/or patently erroneous legal arguments.[10]

Here, the state court causes of actions were legally sound and arguably well pled.[11] For instance, the Employer arguably made out a prima facie defamation claim under Washington State law that requires that a defamation claim state (1)falsity, (2) an unprivileged communication, (3) fault, and (4) damages.[12] Also, as noted above, the remainder of the legal claims in this suit were plead sufficiently under Washington State Law to establish prima facie cases under the respective causes of action. Thus, we would not argue that this suit presents "plainly foreclosed" or "frivolous" legal issues.

However, while a complaint may plead sufficient facts to support a particular cause of action, that does not dispose of the issue of whether the plaintiff has sufficient evidence to support its factual contentions. The Board is entitled to require the state court plaintiff to make a showing that it had such evidence or at least to explain how it could have expected to obtain such evidence through discovery.[13] A respondent cannot avoid a ULP complaint merely by filing a well-pled lawsuit. The analytical problem posed by the instant case was how to determine whether the lawsuit was factually baseless or reasonable when the suit was concluded before the plaintiff adduced any evidence at trial and even before discovery began.

Because this matter was dismissed prior to any discovery, the only factual predicate which could inform a factually baseless determination consists of allegations in the complaint, together with the limited evidence contained in the submitted witness statements and other attached

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[10] Id. at 746 n. 11.

[11] The TRO was undeniably overbroad, and baseless, as it sought to prohibit the Union from, among other things, advertising its dispute with Allied, a clearly protected activity.

[12] See Ernst v. UFCW, Local 1001, 888 P.2d 1196 (Wash. App. 1995).

[13] See Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1376 (7th Cir. 1997), cert. den. 522 U.S. 808 (1997), enforcing 317 NLRB 28 (1995) (Board may enjoin prosecution of state law suit prior to discovery where respondent provides no evidentiary basis for suit and fails to describe what evidence it expects to obtain through discovery).

documentary evidence. While the complaint pleads sufficient facts to support its causes of action, it is unclear whether the Respondent had sufficient evidence to demonstrate that its ultimate factual contentions were reasonable. A supplemental investigation into the Respondent's factual predicate would permit a determination of whether the Respondent could come forward with a sufficient factual basis for its complaint under a summary judgment standard, or with facts, together with proper inferences, that would lead to such a factual predicate.

We need not reach that issue however, since, as noted above, litigation of this matter would not effectuate the purposes of the Act. Thus, the judge recognized the invalidity of the TRO, dissolved it, and ordered attorney's fees. The Employer subsequently withdrew its lawsuit. A Board order would add only a notice posting to the court's remedies.[14] Under these circumstances, we conclude that litigation of this matter would not effectuate the purposes of the Act, and thus that the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[14] See Bill Johnson's, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988). The Board thus routinely orders respondents to reimburse a charging party for its attorney's fees in defending a state court suit. See, e.g., Be-Lo Stores, 318 NLRB 1, 12 (1995), enf. denied on other grounds, 126 F.3d 268 (4th Cir. 1997); Great Scot, Inc., 309 NLRB 548, 549-50 (1992), enf. denied on other grounds, 39 F.3d 678 (6th Cir. 1994); Summitville Tiles, Inc., 300 NLRB 64, 67 (1990); Phoenix Newspapers, 294 NLRB 47, 50-51 (1989).